STATE OF MICHIGAN

COURT OF APPEALS

KING LAKE WILDERNESS RECREATION PROPERTIES, L.L.C.,

Plaintiff/Counter-Defendant-Appellee,

v

DENNIS G. BAILEY and BARBARA BAILEY,

Defendants/Counter-Plaintiffs/Third Party Plaintiffs-Appellants,

and

SCOTT HOLMAN,

Third-Party Defendant-Appellee.

UNPUBLISHED
May 24, 2007

No. 267070
Baraga Circuit Court
LC No. 04-005344-CH

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendants Dennis and Barbara Bailey appeal as of right from a circuit court judgment, following a bench trial, quieting title to disputed property in favor of plaintiff. The trial court rejected defendants' claim that they acquired a prescriptive easement over plaintiff's land. We affirm.

In 1989, defendant Dennis Bailey acquired a 40-acre parcel of property in the northwest quarter of the northeast quarter of section 9 in Covington Township. Plaintiff acquired the remainder of the northeast quarter of section 9 and the northwest quarter of adjoining section 10 in 2002 and 2003. The dispute arises from defendants' use of a two-track road across plaintiff's land that provides access to defendants' property.

Defendants argue that the trial court erroneously failed to recognize their prescriptive easement across plaintiff's property. We disagree. "Actions to quiet title are equitable; therefore, the trial court's holdings are reviewed de novo." *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). However, the trial court's factual findings are reviewed for clear error. *Id*. A prescriptive easement is grounded on the legal fiction that a landowner has granted an interest to an adverse claimant, whether through the owner's active consent or mere

acquiescence. *Slatterly v Madiol*, 257 Mich App 242, 260; 668 NW2d 154 (2003). A prescriptive easement "arises from the use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Killips, supra* at 258-259.

In this case, defendants failed to show that their use of plaintiff's land was adverse or arose under a claim of right. It was undisputed that defendants' property and all the surrounding land was formerly vacant forestland used for logging. At the time defendants acquired their land, plaintiff's land was owned by paper companies and had been registered under the commercial forest act (CFA), MCL 324.51101 *et seq*. Defendants' use alone of "wild and uninclosed [sic] lands" is not sufficient to create a presumption of hostile use. *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932). Instead, they were required to "bring home to the owner, by word or act, notice of a claim of right" to obtain a property interest by prescription. *Id*.

There is no evidence that defendants did or said anything to the paper companies to make it apparent that they claimed a right to the access road. Dennis Bailey made minor improvements to the road on one or two occasions. Such acts are not so inconsistent with the mutual use of the road that it would place the paper company on notice that his use was adverse and superior, rather than permissive. *Wood v Denton*, 53 Mich App 435, 441-442; 219 NW2d 798 (1974). In any event, Bailey sought permission from the company to build up part of the access road with gravel. Bailey also placed a gate at some point on the road, but it was clear that he obtained permission from the company to erect it, and when he started locking the gate, the company had a key to the lock so it could continue to use the road as well.

Furthermore, defendants admit that their use did not meet the 15-year threshold. Instead, they argue that either their predecessors in title had acquired the prescriptive easement years earlier or their predecessors' years of right to the easement tack to theirs. "A party may 'tack' on the possessory periods of predecessors in interest to achieve the fifteen-year period by showing privity of estate. This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance." *Killips, supra* at 259 (citations omitted). To tack successive periods, however, the predecessor's use must likewise be under a claim of right. See *Wood, supra* at 441-442.

Defendants contend that the road was established in 1932 and ripened into an easement in 1947. We disagree. William Nurmela acquired what is now defendants' property in 1932 and retained ownership until 1969. Raymond Seppanen testified that it was his understanding that his grandfather created the access road, but his grandfather was William's brother Eino Nurmela, who did not acquire an interest in William's land until 1969, and Seppanen did not say when Eino might have created the road. He could only say that it existed as of 1968 and that his grandfather used it. There was no evidence that the access road existed at any time before 1968 or that William or Eino claimed a right to the road. To the contrary, Seppanen testified that although he referred to the access road as "Grandpa's forty road," it was "just a woods road" and as far as he knew, his family did not have any special right to use the road. Therefore, defendants failed to prove that either William or Eino Nurmela used the road under a claim of right.

Further, there is no evidence concerning the Seppanens' use of the road once they acquired what is now defendants' property. The evidence showed only that Raymond Seppanen used the road when going hunting while his grandfather still owned what is now defendants' land. Where land is used for "activities directly related to hunting and fishing," no prescriptive easement ordinarily arises, especially with respect to land registered under the CFA. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 647; 528 NW2d 221 (1995). Moreover, nothing indicates that the Nurmelas or Seppanens established privity of estate with defendants. There is no evidence that the deed from Eino Nurmela to Dorothy Seppanen and the other joint owners, or their deed to the Seppanens, included a description of the access road. There is no evidence that Nurmela said anything to Dorothy or Toivo Seppanen about either ownership or a right to use the access road at the time of the transfers in 1978 and 1982. It is undisputed that the deed from the Seppanens to the Baileys did not mention the access road. Although Dennis Bailey testified that Toivo Seppanen may have said something about an easement, he was equivocal on that point and not entirely certain that Seppanen actually used the word "easement." Therefore, defendants did not establish an adverse use for fifteen years.

Defendants alternatively argue that, because the use of the access road had existed for many years, the burden of proof shifted to plaintiff to prove that the use was permissive. If open, notorious, and continuous use and has existed for a number of years beyond the prescriptive period, it is unnecessary to show that the use was claimed as a matter of right. Instead, it is presumed that the use was adverse and under a claim of right, and the burden of proof shifts to the landowner to show that the use was permissive. *Haab v Moorman*, 332 Mich 126, 144; 50 NW2d 856 (1952) (over 20 years); *Reed v Soltys*, 106 Mich App 341, 346-347; 308 NW2d 201 (1981) (50 years). However, defendants did not prove that the access road had been used openly, notoriously, and continuously for an extended length of time. There is no evidence regarding the existence or use of the access road before 1968. Eino Nurmela used the road, but the nature and duration of his use is not known. Seppanen used the access road for a few days during hunting season from 1972 to 1975. There is no evidence regarding any use of the access road from that time until Dennis Bailey acquired the land in 1989. Therefore, even if defendants had raised this issue below, they never showed an open, notorious, and continuous use for enough years to claim a prescriptive easement.

Affirmed.

/s/ Peter D. O'Connell
/s/ Alton T. Davis

Schuette, P.J., did not participate.